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No. 82-401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

California is not asserting that by virtue of 18 U.S.C. section 1161, it has jurisdiction in a criminal or civil sense over an Indian retailer in Indian country, but that its laws, including its licensing laws, set the ground rules for lawful liquor transactions, just as the tribal ordinance sets the ground rules for lawful operation of liquor traffic in Indian country by non-Indians. Jurisdiction is vested only in the United States. If California's licensing laws need not be followed, then a double standard is created, and that is sanctioned neither by the wording of section 1161 or its history.

The Department of Interior has not adhered to a consistent position regarding section 1161, and neither respondent nor the United States has shown how their interpretation of section 1161 would work.

ARGUMENT

I

CONSIDERATION OF NON-INDIAN RETAILERS OPERATING IN INDIAN COUNTRY DISCLOSES THAT CONGRESS DID NOT INTEND TO PREVENT THE STATES FROM EXERCISING THEIR LICENSING AUTHORITY THEREIN

Respondent, who sought a California liquor license in this case, is an Indian, but 18 U.S.C. section 1161, the statute involved in this case, says nothing about Indian retailers. The statute speaks of "act or transaction;" the seller is not identified. The buyer need not be Indian either. Nor do the applicable statutes require the location of the act or transaction be land owned by Indians or held in trust for Indians by the United States. Indian country often includes non-Indian land. See United States v. Mazurie (1975) 419 U.S. 544, 550-52; see also 18 U.S.C. §§ 1151, 1154, and 1156. See generally Seymour v. Superintendent (1962) 368 U.S. 351.

Martin and Margaret Mazurie, both non-Indians, owned and operated the Blue Bull, located on non-Indian owned land (their own) within Indian country of the Wind River Reservation. The population of the area included both Indians and non-Indians. United States v. Mazurie, supra, at 546 - 47.) If the arguments of the United States and respondent are accepted, then the inevitable result is that the states would have no control at all about how a non-Indian on non-Indian land and selling liquor to non-Indians conducted his liquor business. It is petitioner's position that by no stretch of the imagination can it be concluded that Congress intended such a situation to arise.

The United States seeks to prevent the Court from considering these matters by attempting to limit the Court's examination of section 1161 to the facts of this case:

a small general store operated by an Indian on Indian owned land in a remote area of San Diego County. (Br. U.S. p. 7.) But the United States also admits that section 1161 is a statute of nationwide applicability. (Br. U.S. p. 3.) Because this statute is of nationwide applicability and the case involves interpretation of that statute, a proper interpretation must include examination of factors beyond those presented by the facts of the case before the Court.[1/]

The last, and indeed only time, the Court has "visited"[2/] this area of the law was in Mazurie in 1975, and it is quite useful to return to that case now. The Mazuries were charged with and convicted in

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1. The Court of Appeals, in contrast to the United States, recognized the broad scope of section 1161 when it referred to "Indian country liquor transactions." (Petn. Append., p. A-1.)

2. Br. U. S. p. 7.

a federal court of a violation of section 1154 for selling liquor without a tribal license. A number of observations are in order.

First, the United States had "jurisdiction" over the Mazuries to criminally prosecute them. But because the Mazuries were not Indians, the Wind River Tribes could not prosecute them criminally for a violation of its tribal ordinance. (Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191.) In other words, the tribe did not have "jurisdiction" over them.[3/]

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3. For this reason, the reference by the United States to the phrase in section 1161 ". . . an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country" (Br. U.S. p. 13) does not advance its argument. The word "jurisdiction" merely aids in identifying the relevant tribe just as the phrase "in which such act or transaction occurs" aids in identifying the relevant state. Furthermore, "jurisdiction" is used in relation to land -- Indian country -- and

Yet the tribe could require them to obtain a tribal license, and their failure to obtain one resulted in the United States exercising its jurisdiction over them. What is crucial is that this result was reached without a tribe having criminal or civil jurisdiction over a non-Indian or section 1161 conferring criminal or civil jurisdiction onto the tribe.

The same is true of the reverse situation. The state is not claiming criminal or civil jurisdiction over respondent or that section 1161 is a grant of jurisdiction so that it could later criminally prosecute her for anything.[4/] California law, like Wyoming law and the

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Footnote 3 Cont.

not in relation to people. Neither passage therefore is a grant of power over anyone or changes in anyway the relative powers of the state or the tribe.

4. Accordingly, the state's power under Public Law 280 is not considered and

Wind River tribal ordinance, requires a state license, and respondent's failure to obtain one should likewise result in the United States exercising its jurisdiction over her.

Mazurie is instructive on another point. Respondent and the United States argue that the phrase "in conformity" in section 1161 does not mean compliance with a state's licensing laws, only its substantive standards. (Res. Br. pp. 21-26; Br. U.S. pp. 18-20.) The phrase "in conformity" however, modifies both the reference to state laws and the tribal ordinance equally. If "in conformity" is read to mean something less than a

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Footnote 4 Cont.

in fact, Public Law 280 was never advanced by petitioner as a basis for its refusal to issue respondent a license. For this reason, the case does not, as the United States suggests, return to the area of a state's regulatory powers last visited in

licensing law, the Mazuries could not have been convicted of violating section 1154 since their only offense was a failure to obtain a tribal license.

For respondent and the United States to succeed in this case, the court must find a double standard. According to respondent and the United States, an Indian retailer is subject only to a state's substantive standards, not its licensing laws, but a non-Indian retailer is subject to the tribe's licensing laws. Where can this double standard be found? It certainly cannot be found in the language of section 1161. The requirements imposed by Congress to avoid prosecution are placed on any "act or transaction" without regard

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Footnote 4 Cont.

1976 in Moe v. Confederated Salish & Kootenai Tribes, (1976) 425 U.S. 463; and Bryan v. Itasca County (1976) 426 U.S. 373. (Br. U.S. p. 7.)

to the identity of the actor and the word "both" modifies state law and a tribal ordinance. From the words Congress employed, the clear meaning is that if the Mazuries committed a federal crime for selling liquor without a required tribal license, then respondent likewise will commit a federal offense if she sells liquor in California without a required California license.

Nor does this double standard appear in the legislative history. That history was reviewed in the opening brief (Petn. Br. pp. 31-38)[5/] and shows that Congress intended to remove ancient discrimination against Indian liquor comsumers. In other words, the legislative history discloses not only no evidence of an intent to create a double standard, but

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5. Respondent has not shown this review to be inaccurate. (Res. Br. pp. 40-46.)

evidence of an intent that no such double standard be created. Based upon the words of section 1161 and its legislative history, the notion of a double standard should be rejected.

What is needed is an interpretation of section 1161 which makes sense, given the words used and the statute's legislative history, and that interpretation would treat respondent like the Mazuries. Respondent and the United States argue this construction violates the principle that Congress must clearly intend to grant to a state jurisdiction over reservation Indians, and that absent such expressed intent, the states may not require reservation Indians to obtain state licenses. But this interpretation again fails to consider a situation like that presented in Mazurie.

The Mazuries were non-Indians who sold liquor to both Indians and non-Indians from non-Indian owned land. There is no question but if these acts occurred outside Indian country, Wyoming would have the authority under the Twenty-First Amendment to regulate them. Under respondent's and the Court of Appeals' view of section 1161, once the Mazuries entered Indian country, Wyoming lost its power over them to require them to obtain a state license. The question then arises: Did Congress intend to divest the states of their rights under the Twenty-First Amendment to regulate the sale of liquor by non-Indians within their borders because such activity took place within Indian country? A further question is whether Congressional silence on this matter is sufficient to divest the states of this authority, since nowhere in section 1161 or its legislative history is there

the slightest hint that the states will lose their authority over non-Indians.[6/]

An interpretation which treats respondent and the Mazuries the same, and which treats the tribes and the states fairly, is the most reasonable one. Such an interpretation allows the state to require licenses of Indians retailers, just as it allows the tribe to require licenses of non-Indian retailers. The states and the tribes thus set the ground rules for lawful operation of liquor transactions in Indian country, and such ground rules may require licenses. To compel compliance with these ground rules, the United States retains criminal jurisdication over Indians and non-Indians alike. Such a system is

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6. A final question which need not be considered in this case is whether Congress had the power to divest the states of their authority over non-Indians reserved to the states by the Twenty-First Amendment.

created by petitioner's interpretation of section 1161 and is the proper one.

* * * * *

II

EARLY ACTIONS BY THE DEPARTMENT OF INTERIOR SUPPORT THE POSITION THAT INDIAN RETAILERS WERE REQUIRED TO OBTAIN STATE LIQUOR LICENSES

Pointing to a 1971 Department of Interior Opinion ("Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. [illegible], 43 [February 3, 1971]), respondent argues the position therein advanced, which is consistent with respondent's position, is entitled to great weight and should be followed. (Res. Br. pp. 29-35.) An examination of that opinion reveals a complete switch taken on the position by the Department of Interior shortly after section 1161 was enacted. Indeed, the opinion admits as much:

> "We realize that the Chippewa Cree ordinance indicates that all laws governing the sale of intoxicating beverages in Montana

> apply on the Rocky Boy's Reservation. However, this tribal interpretation of law, with which the tribe now apparently disagrees, cannot confer jurisdiction on the State of Montana." (Opinion of the Solicitor, Dept. of Interior, Vol. 2 p. 2029.)

The Department approved that ordinance on April 28, 1954, about nine months after section 1161 was enacted. (19 Fed. Reg. 2572.) So this "tribal interpretation" was a very early one. Further, it was probably not just an interpretation by the tribe, but by the Department as well, for the Department had to approve the ordinance and the Department approved the Wind River Tribes' ordinance (United States v. Mazurie, supra 419 U.S. at 547-48) and the Pala ordinance adopted by respondent's tribe in 1960 (J.A. p. 24). If the Department disagreed with

the tribal interpretations it presumably would have said so before approving them, and required a correction.

That until 1971, the Department acted with the view that a state could require Indian and non-Indian retailers to obtain state licenses if state law required them, becomes clear from the next paragraph in the 1971 Opinion:

> "In addition, we note that a former Solicitor, in a letter to Mr. John W. Stilley of the Arizona State Legislature, dated March 26, 1954, stated in answer to a hypothetical question that an Indian desiring to operate a bar on a reservation would have to obtain a state license. . . . In any event, the views expressed in the 1954 letter of the Solicitor will not be followed to the extent that

they conflict with any of the statements and conclusions contained in this opinion."

The conclusion that the Department changed its position substantially in 1971 from its earlier views is fortified by an examination of an opinion dated September 22, 1954. (Opinions of the Solicitor, Dept. of Interior, Vol. 2, p. 1648.) A careful reading of that opinion appears to support the view that California's licensing laws are applicable in Indian country:

"There is, of course, absolutely nothing in the Act or in its legislative history to suggest that the Congress had any intent to influence the content of the liquor laws of any State. This is true, also, respecting the content of any tribal ordinance adopted pursuant to the Act. Indeed, the

> juxtaposition of the statutory references to the laws of the State and to the tribal ordinances and their inclusion in the same clause with the same absence of modifying or limiting words, indicate that the Congress intended that the scope of such a tribal ordinance is to be as much within the discretion of the tribe as the scope of the State liquor laws is to be within the discretion of the State. The scope of neither appears to be limited by the Act." (Id. at 1649.)

This passage and indeed the entire opinion makes no sense unless the full content of tribal ordinances and the full content of state liquor laws are applicable to Indian country liquor transactions.

There is not the slightest suggestion that the scope of the tribal ordinance is to be treated differently, or the scope of state laws restricted, under section 1161. Thus, it is reasonably clear that when section 1161 was enacted, the Department believed the tribal ordinance and state laws were to be treated the same, and each was to be followed

The Department's changing positions on another point bears some examination. The United States argues that Congress appears to have intended that the newly enacted tribal ordinances ". . . form the plenary authority under which Reservation liquor transactions might take place." (Br. U.S. p. 14.) That position, however, is inconsistent with the testimony of the Commissioner of Indian Affairs, Dillon S. Myer, before the House Subcommittee. (See Petn. Br. Append., A-13--A-32.) In support of the Interior Department's proposed

revision to H. R. 1055 (see Id. at A-18--A-20),[7] Commissioner Myer twice explained:

> "What [the bill] does is to eliminate, I believe, all the statutes regarding prohibition on the use of liquor whether on Indian country or outside, and provide for tribal ordinances in case they do not want liquor on the reservation areas, where the state laws do not apply." (Emphasis added.) (Id. at A-21, see also A-26 -- A-27.) [8]

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7. This proposal was substantially incorporated in H. R. 1055, as subsequently reported out of committee. (See H. R. Rep. No. 775, 83d Cong., 1st Sess. at 1 (1953).

8. Similarly a Senate Report accompany H. R. 1055 states:

> ". . . if this bill is enacted, a State or local municipality or Indian Tribes, if they desire, by the enactment of proper legislation or ordinance, to restrict the sales

If the Department and Congress indeed intended that a tribal ordinance was necessary only to maintain prohibition or restrict liquor transactions on the reservation, and that Congress did not intend to condition removal of liquor prohibition upon the enactment of a tribal ordinance, then liquor transactions could occur without a tribal ordinance. It necessarily follows that Congress thus entertained no intention that a tribal ordinance form the plenary authority for lawful Indian country liquor transactions, and that such transactions were lawful under federal law as long as they conformed to state law.

Footnote 8 Cont.

> of intoxicants to Indians, they may do so." (Emphasis added.)

[S. Rep. No. 722, 83d Cong., 1st Sess. (1953).]

Perhaps the most noticeable change in position is the federal government's changing philosophy towards Indians in the last 50 years. It is interesting to note that respondent points to the 1934 Indian Reorganization Act, 48 Stat. 987 (25 U.S.C. § 476), and two later acts, the Indian Financing Act, Act of April 12, 1974, § 3, 88 Stat. 77 (25 U.S.C. §§ 1451 et seq.) and the Indian Self-Determination and Education Assistance Act, Act of January 4, 1975, § 2, 88 Stat. 2203 (25 U.S.C. §§ 450 et seq.), as examples of ". . . a policy that encourages Indians to govern themselves free from state control." (Res. Br. p. 11.) This is also quite deceiving. The Indian Reorganization Act was enacted during a period of time, between 1928 and 1942, in which federal policy was more tolerant and protective of Indian life and culture. Cohen, Handbook of Federal Indian Law

(1982 Ed.) pp. 144-52. Similarly, the latter two statutes were enacted during a period of time, commencing after 1961, when federal policy was similar to that between 1928 and 1942. (Id. at 180-206.)

However, between 1943 and 1961, federal policy was entirely different and in 1953, the year section 1161 was enacted, the official policy was assimilation. (Id. at 152.) This era included criticisms of earlier policy, transfers of functions from the Bureau of Indian Affairs to other federal agencies and the states, loss of Indian land to non-Indians, budget cuts, relocation, and enactment of legislation terminating federal supervision over many Indian tribes. Passage of section 1161 was part of the assimilation effort. (Id. at 152-80.) Viewed in this perspective, the notion that Congress intended to transfer regulatory control over liquor traffic in

Indian country to the states as well as the tribe, resulting in a reduced federal presence, is entirely reasonable.

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III

RESPONDENT AND THE UNITED STATES HAVE FAILED TO PROVIDE A DEFINITION OF SUBSTANTIVE STATE STANDARDS

One of petitioner's reasons for believing Congress did not intend to draw any distinctions among state laws is the absence of any language in section 1161 suggesting such a distinction, and it was pointed out that the Court of Appeals failed to provide a definition of what is meant by "substantive state standards." (Petn. Br. pp. 18-30, 67-74.) Respondent and the United States have not failed to suggest any definition, they have added to

the confusion engendered by the Court of Appeals' use of that phrase.

At the outset of its argument, the United States asserts there is no issue in this case concerning state power to enforce its liquor laws by means other than a business privilege licensing requirement and that all that is involved is whether a state has the authority to require a tribal Indian to obtain a state liquor license. This appears to mean that an Indian retailer must satisfy all state laws except the one which requires possession of a piece of paper called a license, which need not be followed, and further suggests that the United States believes this case means nothing more than possession of a piece of paper.

However, at other parts of its brief, the United States makes it clear it believes other state laws need not be

followed in Indian country. (Br. U.S. pp. 17, n. 14, 26 & 26, n. 21.) But other than listing a few, the United States does not suggest how the difference between state laws which must be followed, and which state laws may be ignored, should be determined.

Not only does respondent also ignore this problem, she injects the concept of "basic state policies" into the discussion. (Res. Br. p. 78.) Respondent does not indicate whether "basic state policies" are synonymous with "substantive state standards" or if they are different, how they are different, and she does not suggest how basic state policies may be differentiated from non-basic state policies.

Perhaps at this juncture, an example is in order. The United States admits that California's proscription

against sales of liquor between 2:00 a.m. and 6:00 a.m. (Cal. Pen. Code § 398 [West 1983]) would be enforceable against Indian sellers. The Court of Appeals also characterized laws regarding hours of operation as substantive standards. (Petn. Append. p. A-10.) All would also agree that this is a type of restriction on the availability of liquor. Another statute restricting the availability of liquor is found in California Business and Professions Code section 23817 (West 1964), which ties the number of off-sale general licenses to population. According to respondent, this restriction is not a substantive standard. (Res. Br. p. 71.) Yet no one has explained how these conclusions are reached and why one is a substantive standard and the other is not. It appears very likely the only reasoning process employed is that one will know a

substantive state standard or a basic state policy when one sees it.

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IV

RECENT CALIFORNIA LEGISLATION DOES NOT RENDER THIS CASE MOOT OR DEMONSTRATE ACQUIESCENCE IN THE COURT OF APPEALS' DECISION

Respondent's final argument is that a recent amendment to California Business and Professions Code section 23384 (West 1964)[9/] renders this case moot, or if not moot, demonstrates an acquiescence of the Court of Appeals' decision, and this acquiescence undercuts some of petitioner's arguments. (Res. Br. pp. 91-96.) Neither conclusion is correct.

California law strictly controls the activities of all its licensees. With

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9. All references in this argument will be to this Code unless otherwise indicated.

respect to beer manufacturers, wine growers, brandy manufacturers, rectifiers and wholesalers, sales of liquor may be made only to persons holding licenses authorizing the sale of liquor. (§§ 23357, 23358, 23360, 23368, 23378.) Section 23384, prior to its amendment in September, 1982, effective January 1, 1983, permitted these licensees to sell alcoholic beverages

> ". . . to nonlicensees having a fixed place of business or residence upon territory within this State which is maintained by the United States Government as a military or naval reservation or national park or veterans homes, and veterans homes maintained by the State of California."

One of the above-named licensees could, without jeoprdizing its license, sell alcoholic beverages to a non-licensee

only in accordance with section 23384. The 1982 amendment merely added non-licensees in Indian country to those persons to whom these licensees may sell alcoholic beverages. (Cal. Stats. 1982, Chap. 906, § 1, p. 180.) It is quite clear, then, that the amendment was designed for the benefit of these licensees by giving them the freedom to sell to non-licensed retailers in Indian country without fear that the Department of Alcoholic Beverage Control would take action against their licenses. Without this amendment, non-licensed retailers in Indian country would obtain their stock from outside California, which obviously would create an unfavorable economic situation to California liquor distributors.

California is in no sense now granting respondent a license to sell distilled spirits in this state. The

statutes relating to the issuance of licenses were not amended.[10] Respondent may be allowed to sell liquor in California without a license only if she is successful in this case. But if she is, the state has determined there is no reason to penalize its other licensees by closing off a potential source of business. If, on the other hand, petitioner is successful, respondent would not be permitted to sell distilled spirits because she does not have a license to do so. Thus, a live case or controversy remains.

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10. Respondent's assertion that the amendment removed the state licensing requirement for on-reservation liquor retailers is totally inaccurate, as is her assertion that it indicates a judgment that sales in Indian country do not present insurmountable administrative or enforcement problems. (Res. Br. p. 95.)

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, petitioner respectfully submits that the decision of the District Court dismissing the complaint should be affirmed and the decision of the Court of Appeals should be reversed.

Dated: March 8, 1983

Respectfully submitted,

JOHN K. VAN DE KAMP,
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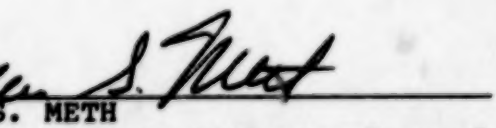
By 
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EVA REHNER,

Respondent.

CERTIFICATE OF SERVICE

I Alan S. Meth, the Attorney of record for Baxter Rice, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of March, 1983, I served three copies of Petitioner's Reply Brief on the Merits in support of Writ of Certiorari were mailed, postage prepaid, in an envelope addressed to each attorney of record, as follows:

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It is further certified that all parties required to be served have been served in accordance with Supreme Court Rule 28.

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